To my mind, whether the withdrawal of the work of review by the Minister amounted to frustration of the contract would certainly depend on the view one takes of the effect of the Minister's direction on the subsisting contract of employment between the plaintiff and the defendants. I take the view that the Minister's withdrawal of the plaintiff's work in doing the review did not destroy the contract of employment. The withdrawal was only a step towards his dismissal and did not strike at the root of the contract he entered into with the defendants. He could easily be put to do other duties and the contract can still be performed. If he was to be dismissed, I am of the view that the prime mover for his dismissal would still be his employer, the defendants, since section 29(3) of the Interpretation and General Clauses Enactment (Sabah) says:

"29(3) Where any state law confers upon any authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to dismiss or suspend any person appointed and to appoint another person temporarily in the place of any person so suspended or in place of any sick or absent holder of such office or place:

Provided that where the power of such authority to make such appointment is only exercisable upon the recommendation, or subject to the approval or consent, of some other authority, the powers conferred by this subsection shall, unless the contrary intention appears, only be exercisable upon such recommendation or subject to such approval or consent."

The defendant, with the concurrence of the Minister, could decide that his services be terminated but before that is done, the defendants would certainly have to contend with and have regard to the existing contract of employment with the plaintiff. Should the defendants fail to do so, then he must pay the penalty. I am of the view that since the defendants did not have regard to the contract existing between them and the plaintiff, they have therefore committed a clear breach of the contract.

In giving this judgment, I am not unmindful of the submission made before me by learned counsel for the defendants when he submitted that they have managed to raise issues of law as regards the issue of frustration of the contract. Having considered this matter, I am of the view that the contract between the defendants and plaintiff has not been affected by frustration for reasons given. To my mind, this is a clear matter of a breach by the defendants in terminating the plaintiff's subsisting contract for which there is no available defence and I, therefore, order judgment for plaintiff against the defendants in amount in the statement of claim with interest and costs.

Order accordingly.

Solicitors: *Skinner Lind Robertson Willie Wong Chin & Co.; Chin Lau Wong & Foo Co.*

CIK ANIZA YAACOB & 763 ORS. v. MOSTEK MALAYSIA SDN. BHD. & 2 ORS.

[O.C.J. (Mohamed Dzaiddin J.) January 26, July 20, September 30, October 19 & November 16, 1987]

[Penang – Originating Motion No. 32-54-86]

Administrative Law – Decision of Industrial Court – Quashing of – Order of certiorari – Application for – Merits of application – Industrial Relations Act 1967, s. 33(A) – R.H.C. 1980, O. 2 r. 1, O. 53 rr. 1 & 2.

The applicants in this case applied to the Industrial Court to refer certain points of law to the High Court for its decision. The application was dismissed by the Industrial Court.

The applicants therefore sought an order of certiorari to quash the decision of the court.

In determining the main issue, two preliminary issues were raised. The third respondent contended, firstly, that the application for certiorari was not properly made as it did not comply with Order 53 rule 2 of the Rules of the High Court. Secondly, it was argued that the present application was actually for a mandamus.

Held, dismissing the application: (1) in this case, leave to apply for an order of certiorari was already granted on an originating motion but the applicants used the same originating motion to apply for a substantive order. This is only an error in form and there was no injustice done to the respondents or that they were in any way prejudiced by such procedural error committed by the applicants. This error was merely an irregularity which was curable under Order 2 rule 1(1);

(2) it was not necessary for the applicants to make the application for an order of certiorari and also for an order of mandamus simultaneously;

(3) in handing down its award, the Industrial Court did consider the correct law and applied its mind to the proper question for the purpose of making the award. It had properly followed the correct principles and applied the four conditions under section 33A(1) of the Industrial Relations Act 1967 and came to its conclusion that the points of law raised were not of sufficient doubt to merit any reference to the High Court. The President of the court had considered the issues thoroughly and correctly. On the fundamental

issues of jurisdiction, he gave his reasons why the court had no extra-territorial powers.

[*Editorial Note:* The applicants are appealing to the Supreme Court against the above decision.]

Cases referred to:

(1) *Hotel Equatorial (M) Sdn. Bhd.* v. *National Union of Hotel, Bar and Restaurant Workers* [1984] 1 M.L.J. 363.
(2) *Mersing Omnibus* v. *Minister of Labour and Manpower & Anor.* [1983] 2 M.L.J. 54.
(3) *Secretary of State for Defence* v. *Warn* [1970] A.C. 394 at 402.
(4) *Harkness* v. *Bell's Asbestos Ltd.* [1966] 3 All E.R. 843 at 845.
(5) *Anisminic* v. *Foreign Compensation Commission & Anor.* [1969] 2 A.C. 147.

ORIGINATING MOTION.

G.S. Nijar (*Mohideen Abdul Kader* and *Miss Meenakshi Raman* with him) for the applicants.

Mahinder Singh Dulku (*Charles Ong Chye Lee* with him) for the first respondent.

M. Nagarajah for the third respondent.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: By this originating motion, the applicants seek for an order of certiorari to quash the decision of the Industrial Court (Award No. 298 of 1986) dated October 16, 1986 which refused to refer points of law to the High Court under section 33(A) of the Industrial Relations Act 1967 ("the Act"). The points of law which the applicants wanted to be referred to the High Court are:

(i) Whether the Industrial Court has the power to join United Technologies Corporation, a company incorporated in the United States of America, as a party to the above-mentioned case, and

(ii) if question (i) is answered in the positive, whether the Industrial Court has the power to order the summons to parties joined (Form L of the Industrial Court Rules 1967) to be served out of jurisdiction.

In refusing to refer the points above further to the High Court, the Industrial Court was of the opinion that the law on the extra-territorial powers of the said court was clear and relying on the authority of *Hotel Equatorial (M) Sdn. Bhd.* v. *National Union of Hotel, Bar and Restaurant Workers*[1] the court was satisfied that the points of law raised were not of sufficient doubt to merit such reference to the High Court under section 33A. It is clear from section 33B(1) of the Act that the decision of the Industrial Court to grant or not to grant an application under section 33A shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court. However, it is equally clear that this court has, under its inherent supervisory power, to quash the said decision by certiorari proceedings if it finds that the Industrial Court has acted without jurisdiction or in excess of its limits of jurisdiction or if it has done or fails to do something in the case of the inquiry which is of such a nature that its decision is a nullity (*Hotel Equatorial*[1] at p. 368.)

Before me, the applicants complained that the court had exceeded its jurisdiction by:

(1) failing to take into consideration the relevant law as to the relationship and position between a holding company and its subsidiary;

(2) failing to take into consideration the fact that United Technologies Corporation (UTC) at all material times was present in Malaysia by its subsidiary company, the first respondent.

(3) failing to take into account that the definition of "employer" in section 2 of the Act includes employer both within and outside Malaysia.

During the hearing of this application, a few preliminary points were raised by counsel, which I must now deal with before embarking further on the main issues. Mr. Nagarajah, for the third respondent, in opposing this application raised the following points.

First, the application for certiorari was not properly made as it did not comply with Order 53 rule 2 of the Rules of the High Court. He pointed out that as it was a substantive application it cannot be made in the same originating motion which the applicants used when applying for leave under Order 53 rule 1. Relying on the authority of *Mersing Omnibus* v. *Minister of Labour and Manpower & Anor.*,[2] counsel submitted that it was fatal to the applicants' case. In reply, Mr. Nijar, for the applicants, conceded that there should be a fresh originating motion filed under Order 53 rule 2 once leave was granted. However, this was not fatal and was curable under Order 2 rule 1(3) of the Rules of the High Court. The issue in *Mersing Omnibus*[2] concerned Order 53 rule 1A which provides that leave shall not be granted to apply for an order of certiorari unless the application for

leave is made within six weeks after the date of the proceeding or the delay is accounted for to the satisfaction of the court or judge to whom the application was made. The application for leave was made after six weeks from the decision of the Minister concerned and no application for extension of time was made nor was the delay accounted for. Abdoolcader F.J. in delivering the judgment of the Federal Court said that in matters before the court the terms of Order 53 rules 1 and 1A clearly reflected the imperative requirements which must be complied with before an application for certiorari can be made. The learned Federal Judge referred to the statement of Lord Hudson in *Secretary of State for Defence* v. *Warn*[3] that: "Procedural sections are usually mandatory and there is nothing which points to the contrary in this case."

In my opinion, the facts in the present application are clearly distinguishable from *Mersing Omnibus.*[2] Here, leave to apply for an order of certiorari was already granted on an originating motion, but the applicants used the same originating motion to apply for a substantial order. I think this is only an error in form and I cannot see any injustice done to the respondents or that they were in anyway prejudiced by such procedural error committed by the applicant. In my judgment, this error is merely an irregularity which is curable under Order 2 rule 1(1). The effect of Order 2 is to do away with the distinction between nullity and mere irregularity at any rate in regard to a failure to comply with the requirements of these rules, although it may still be that there are other failures to comply with statutory requirements or other improprieties so serious as to render the proceedings in which they occur, and any order made therein, a nullity (*White Book 1985* under 2/1/1 p. 9.) When considering the effect of this rule, Lord Denning M.R. in *Harkness* v. *Bell's Asbestos Ltd.*[4] said that "every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice."

Secondly, Mr. Nagarajah submitted that the present application is actually for a mandamus. "Mandamus is an order requiring an inferior court or tribunal or a person or body of persons charged with a public duty to carry out its judicial or other public duty. It can be granted where an inferior court or tribunal is obliged to state a case and is refusing to do so." Counsel referred to *Hotel Equatorial*[1] where the Hotel took the matter to the High Court by way of certiorari and mandamus proceedings in respect of certain questions which the Industrial Court had dismissed. So, what the Hotel did was to apply for an order of certiorari to remove the award of the Industrial Court into the High Court for the purpose of being quashed and they also applied for an order of mandamus to direct the Industrial Court to refer the question of law to the High Court. According to counsel, the applicants had failed to make the second application and cannot now do so because they would be time-barred under Order 53 rule 1.

Counsel submitted that in the present case, there was no prayer for mandamus and therefore it is fatal to the applicants.

Mr. Nijar submitted that the absence of the prayer for mandamus is not fatal to the applicants' case.

On this issue, I agree with Mr. Nijar that it is not necessary for the applicants to make the application for an order of certiorari and also to apply for an order of mandamus simultaneously. As an authority, I rely on *Wade on Administrative Law,* 5th Ed. p. 638:

> "Mandamus is often used as an adjunct to certiorari. If there is power to act, but the power is abused (as by breach of natural justice or error on the face of the record), certiorari will quash and mandamus may issue simultaneously to require a proper rehearing. But either remedy may be used by itself. Defective decisions are frequently quashed by certiorari without any accompanying mandamus. Once the decision has thus been annulled, the deciding authority will recognize that it must begin again and in practice there will be no need for mandamus."

Clearly in *Hotel Equatorial,* the Hotel took the matter to the High Court by way of both proceedings. It is incorrect for respondents' counsel to say the applicants must follow the same, otherwise it is fatal to their case.

Having dealt with the two issues in favour of the applicants, I shall now proceed to consider the substantive application for an order of certiorari to quash the Industrial Court's decision. The questions of law which the applicants want this court to determine under section 33A of the Act relate to the position of a parent company of a wholly-owned subsidiary, which is outside the jurisdiction, to be joined as party to the proceedings before the Industrial Court. The point was first canvassed at the hearing before the Industrial Court on May 12 and June 11, 1986. By its Award No. 187 of 1986 made on July 2 1986, it was of the opinion that the Industrial Court has no extra-

territorial jurisdiction, the court being a creature of statute and therefore being entirely a Malaysian Act, it does not extend to the United States of America or any foreign country. Therefore, being dissatisfied with this ruling, the applicants then applied for the same points of law to be referred to the High Court. The Industrial Court heard the application on October 9, 1986 and on October 16, 1986 handed down its Award No. 298 of 1986. It came to the same conclusion as that in Award No. 187 of 1986. Its conclusions are as follows:

"The law is therefore clear where extra-territorial powers of the Industrial Court is concerned. From the Federal Court case of *Hotel Equatorial (M) Sdn. Bhd.* v. *National Union of Hotel, Bar and Restaurant Workers* [1984] 1 M.L.J. 363, it has been stressed that all four conditions in section 33A of the Act must be satisfied before any point of law can be referred to the High Court. We find that the points of law raised are not of sufficient doubt to merit such reference and we accordingly dismiss the application."

The above conclusion, as forming the basis of the court's decision, is now being attacked by the applicants as being "a jurisdictional error of law in arriving at its conclusion that the question of law was free of sufficient doubt." Counsel for the applicants relied heavily on the House of Lords case of *Anisminic* v. *Foreign Compensation Commission & Anor.*[5] on the question of jurisdictional error. It was submitted that the Industrial Court in deciding its refusal to refer the matter to the High Court had:

(a) posed the wrong factual construct in attempting to answer the question;

(b) asked the wrong question and/or applied the wrong test;

(c) failed to take into account relevant considerations and took into account irrelevant considerations;

(d) answered the questions and failed to consider, in the light of the correct law, whether there was sufficient doubt.

In my judgment, I am satisfied after reading the award that the Industrial Court in handing down its award did consider the correct law and applied its mind to the proper questions for the purpose of making the award. It had properly followed the correct principles and applied the four conditions under section 33A(1) of the Act and came to its conclusion that the points of law raised were not of sufficient doubt to merit any reference to the High Court. I should reiterate that the President of the court had considered the issues thoroughly and correctly. On the fundamental issue of jurisdiction, he gave his reasons why the court has no extra-territorial powers.

For the above reasons, I have no reason to disagree with him. This application for a judicial review by way of certiorari is therefore dismissed. In the exercise of my discretion, I make no order as to costs.

Application dismissed.

Solicitors: *Nijar & Nijar; Mohideen Abdul Kader Meena Rejes & Partners; Mahinder Singh Dulku; Jayaraman, Ong & Co.; Shook Lin & Bok.*

KENIDI BIN SIMA & ANOR. v. THE GOVERNMENT OF THE STATE OF SABAH & ANOR.

[O.C.J. (Chong Siew Fai J.) October 16, 1987]

[Kota Kinabalu – Originating Summons No. 121 of 1987]

Local Government – Census taken by government – Private company assisting – Interlocutory injunction to restrain private company from assisting – Application for – Merits of application.

The first and the second plaintiffs came to Sabah from the Philippines. Sometime after their arrival, they registered themselves with the Resettlement (or Settlement) Division of the Chief Minister's Department. In 1987, an exercise was conducted by the first defendant, the Government of the State of Sabah, and the second defendant, Institute For Development Studies (Sabah), a private company, to establish the identities and actual status of refugees and illegal immigrants. Fearing police action or deportation, the two plaintiffs applied for an interlocutory injunction to restrain the second defendant whether by themselves or by their directors, officers, servants or agents from assisting the first defendant in the exercise.

Held: (1) the issues raised required investigation in depth and mature consideration of the law such as the Federal Constitution and some other enactments;

(2) even if the second defendant was restrained in this application, there was nothing to prevent the first defendant from itself carrying on or enlisting the assistance of other bodies or persons to carry on the exercise. The impracticability and the ineffectiveness of the interlocutory relief as sought in relation to the continuance of the exercise was obvious;

(3) damages would be an adequate remedy and the defendants would be in a financial position to pay them;